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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY, PACIFIC BELL, NEVADA BELL, THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY, THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF MARYLAND, THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA, THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, NEW JERSEY BELL TELEPHONE COMPANY, THE DIAMOND STATE TELEPHONE COMPANY, AND SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

In early 1976, the Federal Communications Commission prescribed a 9.5 percent rate of return for the Bell System's interstate services, plus another .5 percent as an efficiency incentive. This required AT&T to design rates for the Bell System that, based on AT&T's best estimates of future costs and market conditions, would most likely produce actual future returns within the FCC's prescription. AT&T filed rates in 1976 that then produced actual returns of 9.25 and 9.59 percent in 1976 and 1977, respectively, and 10.22 percent in 1978.

Six years later, in 1984, the FCC determined that the 1978 earnings were excessive and required AT&T and telephone companies then recently divested from AT&T to refund the 1978 overage retroactively. The refund was to be effected by requiring the carriers to reduce their current rates below levels that were otherwise authorized by the FCC. The FCC refused to allow the carriers to be made whole for the shortfall in 1976. After arguments by petitioners here that the pertinent provisions of the Communications Act are designed to preclude retroactive rate adjustments and that numerous cases in this Court and the Courts of Appeals reject such adjustments under parallel federal regulatory statutes, the District of Columbia Circuit, in a split decision, affirmed the FCC's action as within its statutory power.

Against this background, the question presented is:

> **Whether the FCC's 1984 order to reduce current rates to effect a refund of 1978 earnings constitutes retroactive ratemaking in violation of the specific provisions of the Communications Act of 1934.**

RULE 28.1 LISTING

Southern Bell Telephone and Telegraph Company, South Central Bell Telephone Company and BellSouth Capital Funding Corporation are wholly owned subsidiaries of BellSouth Corporation which have outstanding publicly owned securities. BellSouth Corporation partially owns Air Call Communications Ltd., which is also partially owned by Air Call PLC, a company whose securities are publicly traded in the United Kingdom. BellSouth is in the process of acquiring Mobile Communications Company of America, a company which has outstanding publicly owned securities.

The parent company of Pacific Bell and Nevada Bell is Pacific Telesis Group. PacTel Products and Athens Cellular, Inc. are the only non-wholly owned subsidiaries or affiliates of those corporations.

The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, Diamond State Telephone Company and New Jersey Bell Telephone Company are subsidiaries of Bell Atlantic Corporation. Bell Atlantic does not have a parent company. Its subsidiaries and affiliates (other than wholly owned subsidiaries) are Bell Atlantic Directory Graphics, Inc., and two partnerships: the Chesapeake Directory Sales Company and Bell Atlantic Vehicular Leasing. In addition, Bell Atlantic Mobile Systems, Inc., Bell Atlantic's cellular subsidiary, participates in several limited partnerships which provide cellular service in various metropolitan areas. Bell Atlantic Properties, Inc., Bell Atlantic's real estate subsidiary, is also involved in several real estate development partnerships. None of these partnerships has securities outstanding to the general public.

The parent company of Southwestern Bell Telephone Company is Southwestern Bell Corporation. Gulf Printing Company is also a subsidiary of the parent and is the only non-wholly owned subsidiary or affiliate of either corporation.*

* Additional parties to the proceeding below not joining in this Petition were American Telephone & Telegraph Co., Ameritech Operating Companies, GTE Service Corp., MCI (formerly Satellite Business Systems), Mountain States Telephone & Telegraph Co., National Telephone Cooperative Association, New England Telephone & Telegraph Co., New York Telephone Co., Northwestern Bell Telephone Co., Organization for the Protection and Advancement of Small Telephone Companies, Pacific Northwest Bell Telephone Co., Telecommunications Research & Action Center, and United States Telephone Association.

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FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, several telephone companies divested by AT&T in 1984, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Co-

lumbia Circuit entered on August 21, 1987. Petitions for rehearing and suggestions for rehearing *en banc* of the decision of the Court of Appeals were denied on November 2, 1988.

OPINIONS BELOW

The decision of the Court of Appeals for which review is sought here is reported at 826 F.2d 1101 and is reproduced in Appendix A, accompanying this Petition. The orders of the Court of Appeals denying petitions for rehearing and suggestions for rehearing *en banc*, together with accompanying statements, are unreported and are reproduced in Appendix B. The order and reconsideration order of the Federal Communications Commission affirmed by the Court of Appeals are reproduced in Appendices C and D. The FCC's initial order is reported at 102 F.C.C.2d 52 (1984). Its order on reconsideration is unreported.

JURISDICTION

The decision of the Court of Appeals for which review is sought was entered on August 21, 1987. The court's orders denying petitions for rehearing and suggestions for rehearing *en banc* were entered on November 2, 1988. This petition has been filed within 90 days of that date, as required by 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions involved in this case are Sections 4(i) and 203 to 205 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 203-205. They are reproduced in Appendix E.

STATEMENT OF THE CASE

This case involves a fundamental dispute over the rate regulation powers of the Federal Communications Commission ("FCC"). A panel majority of the court below,

consisting of Circuit Judge Mikva and District Judge Parsons,[1] upheld agency action that was taken without any explicit statutory authority whatsoever and, moreover, was in plain conflict with the Communications Act and long settled regulatory law involving parallel federal regulatory acts. A sharply divided Court of Appeals denied suggestions for rehearing *en banc*, and in response, several dissenting judges made it clear why this case should be reviewed:

> "The fundamental issue presented . . . is of manifest importance. Not only are the economic stakes staggeringly high, but the FCC has . . . purported to exercise a power which Congress never conferred upon it. . . . In the process, the Commission's rate-making revolution flies in the teeth of . . . virtues . . . that rate regulatory regimes are designed to foster.
>
> "The errors complained of are, in short, profound." [2]

Ultimately, the resolution of this dispute has major consequences for all of the carriers and ratepayers subject to the Communications Act and, indeed, consequences for those subject to parallel federal regulatory schemes.

Sections 203 to 205 of the Communications Act erect a statutory scheme that balances the interests of ratepayers and carriers by providing stable and predictable charges for both. Under Section 203 of that scheme, a carrier may itself initiate rates, subject to public comment and FCC review. If these rates prove to be too low, the carrier's recourse is to file new rates, but these rates may not seek to make the carrier whole for the inadequate earnings under the first set of rates. On the other hand, if the first rates are determined to be too

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[1] United States District Judge for the Northern District of Illinois sitting by designation pursuant to 28 U.S.C. § 294(d).

[2] App. at 44a (Starr, J., joined by Buckley and Williams, J.J., dissenting).

high, charges collected under those rates are not subject to later refund, unless the FCC, acting under Section 204, had first suspended the rates and then allowed them to go into effect subject to an accounting order pending an investigation into their lawfulness.[3]

Under Section 205 of the Act, the FCC itself is authorized to prescribe, after investigation, "what will be the just and reasonable charge . . . to be thereafter observed." Charges so imposed by the FCC are not subject to subsequent challenge by ratepayers, the FCC or carriers as too high or too low and, therefore, are not subject to retroactive adjustment either. *See Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 389-90 (1932).

In short, until this case, whether rates were carrier-initiated or FCC-prescribed, ratepayers and carriers knew with certainty the level of their charges, and the Communications Act codified an important balance in protecting this interest. That is, ratepayers were protected from later attempts to boost charges retroactively, whether by collecting additional charges or artificially increasing current rates. Likewise, carriers were protected from later attempts to lower charges retroactively, whether by refunds effected through decreases in current rates or otherwise.

In 1976, however, instead of prescribing specific rates to be charged by AT&T, the FCC prescribed a rate of return of 9.5 percent, plus an additional .5 percent as an incentive to productivity and efficiency.[4] By prescrib-

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[3] An accounting order requires a carrier "to keep accurate account of all amounts received by reason of [a] charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid." 47 U.S.C. § 204.

[4] Decision, *AT&T Charges for Interstate Telephone Service*, Docket No. 20376, 57 F.C.C.2d 960, 973 (1976). The FCC's practice of prescribing a rate of return instead of rates had been

ing a rate of return, the FCC required AT&T to file rates which, based on AT&T's best estimates of future demand for service and the costs of that service, would most likely produce an actual return of 9.5 percent. AT&T could not guarantee that its rates would precisely achieve the prescribed return, for the process of setting future rates is inherently one of economic prediction, not an exact science.[5] The FCC's rate of return prescription could be enforced, however, by requiring that the initial rates be targeted to the prescribed return, and if actual returns began to exceed the prescribed return, those rates could be reduced to come thereafter within the prescribed return. Indeed, the FCC stated in its 1976 prescription order that if AT&T's returns exceeded 10 percent, it would merely "require [a] downward adjustment of AT&T's overall interstate rates."[6]

No one, including the FCC, has ever disputed that the rates AT&T filed in 1976 were targeted to achieve the prescribed return of 9.5 percent. In particular, the FCC did not commence an investigation or impose any accounting order under Section 204 related to whether

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recently upheld in *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975), but that decision did not address in what ways the FCC could enforce such a prescription consistently with the Communications Act.

[5] *See Board of Trade v. United States*, 314 U.S. 534, 546 (1942) ("The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed"); *Ashland Coal & Ice Co. v. United States*, 61 F. Supp. 708, 713 (E.D. Va.), *aff'd per curiam*, 325 U.S. 840 (1945) ("The process of rate making cannot be solved by the rigid application of algebraic formulae or reduced to the monotonous regularities of mechanical instrumentalities"). For a detailed discussion of the ratemaking process, see *Distrigas Corp. v. FERC*, 737 F.2d 1208, 1211, *vacated*, 751 F.2d 20 (1st Cir. 1984).

[6] 57 F.C.C.2d at 973.

AT&T's rates were appropriately calculated to achieve no more than the prescribed return.[7] In fact, AT&T's rates produced actual returns of 9.25 and 9.59 percent in 1976 and 1977, respectively, amounting to a $100 million shortfall in 1976.[8] In 1978, however, the same rates produced a return of 10.22 percent, or $101 million above the 10 percent maximum allowed by the FCC. For the entire three-year period, these rates produced a return of 9.69 percent, well within the FCC's limit.

Six years later, in 1984, the FCC determined that AT&T's rates were too high in 1978. The FCC ordered AT&T and its former telephone operating companies to refund the 1978 overage by reducing their current charges to make up for the charges that were too high in 1978.[9] It claimed authority to take this action under Sections 205 and 4(i) of the Act, the latter of which permits the agency to take any action "necessary" to executing its functions, provided the action is "not inconsistent with" the Act. No allowance, however, was made for the shortfall in 1976. Because there was no relevant accounting order, the FCC's refund order could

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[7] The FCC did suspend the rates for one day and impose an accounting order on other issues. *American Tel. & Tel. Co.*, 58 F.C.C.2d 1 (1976). That order, however, because it did not make rate of return an issue, is not relevant here, and the FCC has never contended otherwise. Indeed, in allowing the 1976 rates to go into effect the FCC stated: "we cannot find the economic material filed in support of the tariff revisions inadequate or erroneous." *Id.* at 3.

[8] Comments of American Telephone & Telegraph Co. in Response to Notice of Inquiry, at 30, *AT&T Earnings on Interstate and Foreign Services During 1978*, CC Docket No. 79-187 (filed Nov. 13, 1979) (set forth in Joint Appendix before Court of Appeals at 188).

[9] Decision, *AT&T Earnings on Interstate and Foreign Services During 1978*, CC Docket No. 79-187, FCC 84-567, 102 F.C.C.2d 52 (1984) (App. C).

not and did not rely on Section 204, the only provision in the Act that allows for refunds.[10]

The FCC thus imposed a completely new form of rate regulation that created and placed risks of regulatory uncertainty entirely on carriers, and it did this after 1978, depriving AT&T of the opportunity to take protective action, such as seeking a higher rate of return authorization for 1978. By ordering retroactive rate adjustments, the FCC destroyed stability in the regulation of rates. Carriers were also disproportionately burdened because they were required to refund an unforeseeable excess but, at the same time, denied the opportunity to recover a similarly unforeseeable shortfall from a return determined by the FCC itself to be fair.

The FCC's assertion of its new found power has not ended with AT&T's 1978 earnings. Since 1984, the agency has sought to apply this power in other instances. For example, it has unsuccessfully attempted to implement rules that generally required carriers to refund excess returns but did not allow carriers retroactively to recoup earnings shortfalls, a scheme characterized as "turn[ing] the regulatory world upside down" when it was invalidated on appeal.[11] More recently, the FCC has

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[10] *Id.* at 65 (App. at 66a-67a). The court below also found that Section 204 "does not apply to the circumstances of this case." 826 F.2d at 1107.

[11] The D.C. Circuit invalidated the FCC's rules as arbitrary and unreasonable in *American Tel. & Tel. Co. v. FCC,* 836 F.2d 1386 (D.C. Cir. 1988), but did not reach the statutory power issue presented here and in the decision below. *See id.* at 1389. The case was decided while the decision below was pending petitions for rehearing. *Id.* at 1392 n.6. Judge Starr, however, did not see any reason to sidestep the statutory power question and issued a lengthy concurrence rejecting the FCC's "innovations of late [as] without statutory foundation." *Id.* at 1393. Judge Starr went directly to the root of the matter, finding that under the FCC's program, "carriers are no longer able to rely on filed rates; instead, they go about their business in constant jeopardy of being forced

ordered refunds for allegedly excess rates,[12] even though it expressly declined to impose an accounting order prior to allowing the rates to go into effect.[13]

Several parties, including the former AT&T operating companies, petitioned the court below to review the FCC's 1978 refund order. In a split decision rendered August 21, 1987, the Court of Appeals upheld the agency's action, noting, however, that the case involved "fundamental opposition to the agency's view of its regulatory authority." (App. at 10a.) Judge Mikva, writing for himself and Judge Parsons, held that Sections 205 and 4(i) authorized the FCC's action and that the Communications Act did not preclude the retroactive ratemaking effected by that action. Judge Buckley dissented, noting that "[f]or more than 50 years, the Communications Act has been understood to establish a precise, express statutory scheme governing refunds" and that "[n]ever before has [the Act] been held to authorize refunds" in the manner that the FCC asserted. (App. at 22a.)

Upon another split vote, the Court of Appeals denied petitions for rehearing and suggestions for rehearing *en banc* on November 2, 1988. Judge Starr filed a dissenting statement joined by Judges Buckley and Williams. Judge Starr's dissent pointedly noted that the Commission's "clawback approach" to rate regulation

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to refund enormous sums of money . . . . The Commission has turned the regulatory world upside down. The Act, which is purely prospective in design, manifestly does not contemplate this unsettling state of affairs." *Id.* at 1394.

[12] Memorandum Opinion and Order, *Annual 1988 Access Tariff Filings*, CC Docket No. 88-1, Phase II, FCC 88-420 (released Dec. 27, 1988).

[13] Memorandum Opinion and Order, *Annual 1988 Access Tariff Filings*, CC Docket No. 88-1, Phase I, 3 F.C.C. Rcd 2043, 2044 (1988).

did "violence to well-settled, salutary doctrines" and that "the Commission's ratemaking revolution flies in the teeth of the twin virtues of stability and predictability which rate regulatory regimes are designed to foster." (App. at 44a.) Judge Sentelle filed a separate statement noting the importance of the statutory power question but voted to deny rehearing because of multiple recusals by Judges R. B. Ginsburg, Silberman and D. H. Ginsburg. (App. at 45a.) Consequently, as Judge Starr also noted, the law "on a pivotal statutory issue cutting across agency lines" was left "distressingly unsettled." (App. at 44a.) This Petition, to have the matter definitively and correctly decided, followed.

REASONS FOR GRANTING THE WRIT

I. The Court Below Decided a Novel Question Fundamental to Rate Regulation Under the Communications Act in a Manner Contrary to the Act.

The Supreme Court should hear this case because the decision below upholds FCC action that is flatly contrary to the Communications Act and long settled rate regulation law. That law recognizes that the process of setting rates is intrinsically predictive in nature. Inevitably, there will be under or overearnings as expected costs and demand exceed or fall short of actual costs and demand. Permitting retroactive ratemaking, however, to correct for such shortfalls or overages would give rise to continuous revision of past charges.

The practice, therefore, of adjusting current charges to recoup deficient, or to refund excess, past earnings has been prohibited. "The common law of public utility regulation pragmatically accepts the futility of embroiling current and future rate regulation with a function of making correctives for excess or insufficiencies of rates charged in the past." *American Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1057 (D.C. Cir. 1977), *cert.*

denied, 435 U.S. 907 (1978). The courts have repeatedly emphasized this prohibition.[14]

It is evident from an examination of the operation of the Communications Act's provisions themselves that the Act incorporates the same prohibition. The Act's scheme permits carriers to file new rates in order to increase earnings when the return from existing rates becomes too low. Further, the FCC may initiate an investigation into existing rates and prescribe new rates "to be thereafter observed" if the agency believes the existing rates have become unreasonable. Plainly, the basic thrust of these complementary provisions is to provide for prospective correction of existing rates according to procedures that balance ratepayer and carrier interests. Nothing in the Act permits the adjustment of current rates to recoup past deficient earnings, or to refund past excess earnings.

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[14] *See, e.g., Transcontinental & Western Air, Inc. v. CAB*, 336 U.S. 601, 605 (1949) (declining to construe a statute in a manner that would "mark a departure from the customary pattern of fixing rates prospectively" and "break with . . . traditions of ratemaking"); *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31-32 (1926) ("[p]ast losses cannot be used . . . to support a claim that rates for the future are confiscatory . . . . And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations"); *Distrigas Corp. v. FERC*, 751 F.2d 20, 23 (1st Cir. 1984) ("traditional rate-making principles . . . typically limit the regulator's rate-setting power to *prospective* changes") (emphasis in original); *Nader v. FCC*, 520 F.2d at 202 "[i]t is a cardinal principle of ratemaking that a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle"). *See also* I A. Priest, *Principles of Public Utility Regulation* 75 (1969) ("It has long been established that past deficits may not be made the predicate for striking down rates which are otherwise compensatory, 'any more than past profits can be used to sustain confiscatory rates for the future'"); E. Nichols & F. Welch, *Ruling Principles of Utility Regulation* 315 (1964) (Supp. A) ("Past losses of a utility cannot be recovered from consumers, nor can consumers claim a return of profits and earnings which may appear excessive").

Here, however, the court below upheld FCC action ordering that current rates be reduced below levels that were otherwise authorized in order retroactively to correct past rates and the overearnings they produced, but not underearnings.[15] Not only, therefore, was the agency action upheld below unlawfully retroactive but also it unfairly disadvantaged carrier interests. Although AT&T incurred a shortfall for 1976, the FCC made no allowance for this shortfall when it ordered reduced rates to make up for the 1978 overage. Instead, it announced a regulatory regime under which carriers will be at risk for refunds if their charges, however, carefully calculated, turn out too high, yet there is no correlative impact on ratepayers if those charges turn out too low. The Communications Act, however, is a member of a generation of regulatory enactments containing "precise procedures and limitations" designed to achieve "a careful accommodation of interests" subject to those enactments.[16] The power upheld here fundamentally disregards the Communications Act's carefully balanced plan.

The legislative history underscores the absence of retroactive rate regulation authority in the Communications

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[15] Under the statutory scheme, the FCC's remedy was to order that the rates on file be retargeted to the prescribed return. The FCC made no such order, however, because it was quite apparent that AT&T's costs were actually increasing as inflation spiralled out of control in the latter half of the Seventies. Indeed, the FCC authorized AT&T in 1979 to earn above the 10 percent maximum return allowed in 1976, suggesting, as the carriers have always maintained, that there was nothing unreasonable about the 1978 return, even if it was in excess of the 1976 prescription. *See American Tel. & Tel. Co.*, 73 F.C.C.2d 689, 694-95 (1979). Eventually, the FCC authorized a specific return of 10.50 percent in 1980, *American Tel. & Tel. Co.*, 78 F.C.C.2d 661, 668-70 (1980), and a return of 12.75 percent in 1981. *American Tel. & Tel. Co.*, 86 F.C.C.2d 221, 251 (1981), *aff'd, United States v. FCC*, 707 F.2d 610 (D.C. Cir. 1983).

[16] *American Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 873 (2d Cir. 1973). *Accord United States v. SCRAP*, 412 U.S. 669, 697 (1973).

Act. The Communications Act was patterned after the Interstate Commerce Act.[17] Prior to the enactment of the Communications Act, the Commerce Act was amended to authorize retroactive rate regulation which would recapture excess railroad earnings.[18] The provision for retroactive rate regulation, however, was repealed in 1933 because it was unworkable and had a destabilizing effect on carrier revenues.[19] Nothing like it, therefore, became part of the 1934 Communications Act. The FCC's bald attempt to reintroduce retroactive ratemaking by the order upheld below thus represents not only a departure from the plain statutory scheme established in the language of the Communications Act, but also a repudiation of the clear intent of Congress.

The FCC has employed a device that cannot be found anywhere within the Communications Act's statutory scheme and, in so doing, has replaced the Act's objectives of predictability and stability with unnecessary risk. Gone as well with the FCC's adventure and the decree of the court below that "carriers . . . have no statutory entitlement to a perfectly balanced regulatory scheme" (App. at 15a) is the Act's balanced accommodation of carrier and ratepayer interests. Now, carriers are vulnerable to refunds for overearnings and are without recourse for shortages from underearnings. Because the decision below upholds agency action that fundamentally conflicts with basic ratemaking precepts and the Communications Act's rate regulation scheme, this Court, which has never previously considered that scheme, should grant this Petition to decide the important question presented.

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[17] *See generally* S. Rep. No. 781, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. (1934).

[18] 41 Stat. 456, 488-91 (1920).

[19] 48 Stat. 220 (1933). *See also* H.R. Conf. Rep. No. 213, 73d Cong., 1st Sess. 29 (1933).

II. The Decision of the Court Below Is in Conflict with the Decisions of this Court and Other Decisions of the Courts of Appeals.

The ratemaking provisions of the Natural Gas Act and the Federal Power Act parallel the ratemaking provisions of the Communications Act.[20] In each of these ratemaking regimes, the carrier has the authority to initiate new rates. The regulatory commission may suspend and investigate new carrier-initiated rates. It may prescribe lower rates if it finds that the carrier-initiated rates are too high. If it is unable to complete its investigation within the suspension period, it may issue an accounting order requiring the carrier to keep records of the revenues it collected under the new rates so that refunds can be made if the rates are ultimately found to be too high. The commission may also initiate its own investigation and prescribe rates to be charged in the future if it finds existing rates to be unreasonable.[21]

Numerous decisions of this Court and the Courts of Appeals construe the provisions of these regulatory statutes that are essentially identical to the Communications Act to prohibit the kind of retroactive ratemaking upheld below. Therefore, left standing, the decision

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[20] *Compare* 47 U.S.C. §§ 203-05 (Communications Act) *with* 15 U.S.C. §§ 717c-717d (Natural Gas Act) *and with* 16 U.S.C. §§ 824d-824e (Federal Power Act).

[21] The essential similarity among the rate regulation schemes of the Communications Act, Federal Power Act and Natural Gas Act has often been recognized. *See, e.g., Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) ("relevant provisions of the [Federal Power Act and Natural Gas Act] 'are in all material respects substantially identical'"); *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981); *American Tel. & Tel. Co. v. FCC*, 487 F.2d at 877 n.21 ("Section 4(e) of the Gas Act gives the FPC a suspension power similar to that of Section 204 of the Communications Act . . . . The prescription authority created by Section 5(a) of the Gas Act is substantially the same as that of Section 205 of the Communications Act").

of the court below will infect the future application of federal regulatory acts that are like the Communications Act. This Court should review the decision below to correct the unsettled state of affairs that has been created.[22]

For example, construing provisions of the Natural Gas Act, this Court has ruled that:

> "The gas operator . . . may . . . file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the 5-month suspension provision under § 4 . . . . [Section] 5 of the Act . . . authorizes the Commission . . . to institute an investigation into existing rates and charges . . . . Under this section, however, the rate found by the Commission to be just and reasonable becomes effective prospectively only. Gas purchasers, therefore, have no protection from excessive charges collected during the pendency of a § 5 proceeding."

Atlantic Refining Co. v. Public Service Commission, 360 U.S. 378, 389 (1959). Similarly, the Tenth Circuit has noted that "the Commission may order [a] retroactive refund only where a company's rates have been suspended pending a § 4 review." *Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803, 808 (10th Cir. 1986).[23] But for the different section numbering, these could just as easily be statements about Sections 204 and 205 of the Communications Act.

The requirement of prospective relief, as the D.C. Circuit itself explained in a decision construing the Natural Gas Act,

> "is apparent from the language of the Act. Section 5 refers to FERC's power to determine the just and

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[22] The decision below is all the more threatening because it was rendered by the D.C. Circuit, the Court of Appeals that most often reviews the actions of federal regulatory agencies.

[23] *See also Dorchester Gas Producing Co. v. FERC*, 848 F.2d 634, 637 (5th Cir. 1988).

> reasonable rate . . . to be *thereafter* observed . . . . Section 5 . . . conspicuously lacks the explicit provision for refunds and associated accounting requirements found in section 4."

Sea Robin Pipeline Co. v. FERC, 795 F.2d 182, 184 n.1 (D.C. Cir. 1986). Section 205 of the Communications Act, the only substantive provision on which the FCC based its claimed retroactive ratemaking power, contains, of course, the same "thereafter" language.

The decisions of this Court and the Courts of Appeals construing the Federal Power Act reach the same result. For example, this Court stated in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956), that the FPC's power under the analogue to Section 205 of the Communications Act was limited to prescriptions " 'to be thereafter observed' and thus can effect no change prior to the date of the order." Thus, as the Court more recently stated in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981), "the Commission itself has no power to alter a rate retroactively. When the Commission finds a rate unreasonable, it 'shall determine the just and reasonable rate . . . to be *thereafter* observed and in force.' This rule bars 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.' " (Emphasis in original.)

The First Circuit has stated that under the Federal Power Act, a "utility has no obligation to give customer refunds, even if the rates are found unreasonably high." *Massachusetts v. United States*, 729 F.2d 886, 887 (1st Cir. 1984).[24] Even the D.C. Circuit has ruled that under the Federal Power Act:

> "A customer cannot . . . refuse to pay a rate currently in effect on the ground that it has become

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[24] *Accord Boston Edison Co. v. FERC*, 856 F.2d 361, 368-69 (1st Cir. 1988); *Gulf States Utils. Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471, *modified*, 831 F.2d 557 (5th Cir. 1987).

> unlawfully high and therefore void; nor after payment of such a rate, can the Commission order a refund . . . . [T]he procedures that the statute establishes for adjusting unlawful rates . . . are not at all ambiguous: 'Whenever the Commission . . . shall find that any rate . . . is [unlawful], the Commission shall determine the just and reasonable rate . . . *to be thereafter observed* . . . .' "

Electrical District No. 1 v. FERC, 774 F.2d 490, 492 (D.C. Cir. 1985) (emphasis in original).[25]

In the face of these uniform rulings, the FCC and the panel below sought refuge in Section 4(i) as well as Section 205 of the Communications Act.[26] Section 4(i) does provide that the Commission "may . . . issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions." However, "in exercising authority pursuant to Section [4(i)], the Commission's action must not be inconsistent with Sections 203-05."[27] And even if that action does not explicitly conflict with statutory provisions, it must not be in "circumvention of the statutorily prescribed procedures with consequent frustration of the statutory purpose."[28]

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[25] The rate regulation schemes of the Communications Act, Natural Gas Act and Federal Power Act parallel each other because they have as their common template the Interstate Commerce Act. Under the original rate regulation provisions of that Act too, 49 U.S.C. §§ 10704, 10708, 10762, this Court held in *ICC v. American Trucking Ass'ns*, 467 U.S. 354, 361-64 (1984), that retroactive rate action is prohibited.

[26] Indeed, the FCC conceded below that "Section 205 does not specifically provide for the enforcement of Commission prescriptions through refund orders . . . ." Decision, *AT&T Earnings on Interstate and Foreign Services During 1978*, 102 F.C.C.2d at 65 (App. at 67a).

[27] *American Tel. & Tel. Co. v. FCC*, 487 F.2d at 877.

[28] *Id.* at 875.

There is no doubt that the FCC's retroactive rate action here was inconsistent with the Act's regulatory scheme, which requires prospective action. The FCC's action also substantially frustrated the Act's objectives of predictability and balanced interests. The FCC created instability where there was none, and ratepayers were given new protection, while carriers were subjected to broader refund liability than the Act explicitly allows and, moreover, were not protected against underearnings.

In short, Section 4(i) affords no basis for inferring the power asserted here. Indeed, the Natural Gas Act and Federal Power Act contain provisions authorizing agency action "necessary or appropriate" to carry out the provisions of those acts. Yet retroactive ratemaking is prohibited under those acts, even though their interstitial power provisions do not contain the "not inconsistent with" limitation found in Section 4(i) of the Communications Act.[29]

Retroactive rate regulation poses a threat of ominous proportions, particularly if it features the one-sided approach that characterized the agency action upheld below. The FCC's constant approach of forcing downward revi-

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[29] The power that the FCC would infer under Section 4(i) is also unnecessary. The Act already provides a remedy where a return prescription is eventually exceeded: the FCC may prescribe new rates targeted to the prescribed return, and the agency requires quarterly reports by carriers to enable it to determine when rates have gotten out of line. *See* Report and Order, *Amendment of Part 65*, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986). Intentional evasions of a return prescription may be intercepted under Section 204 when the offending rates are filed. In addition, Section 205(b) provides civil fines for knowing failure to file rates designed to comply with an FCC prescription, authorizing sanctions irrespective of when an intentional evasion is discovered, and Section 501, 47 U.S.C. § 501, provides criminal sanctions for willful violations. It should be noted, however, that no one has even suggested, and the FCC, in fact, concedes, that the 1978 overage occurred in good faith. *See* Brief of FCC, *New England Tel. & Tel. Co. v. FCC* at 26, No. 85-1087 (D.C. Cir. filed Mar. 4, 1986).

sions to returns without regard to when returns are deficient would assuredly impair investor confidence and the ability of carriers to raise new capital, ultimately adversely affecting the public interest. That approach has been rejected by this Court and the Courts of Appeals construing other regulatory acts. It is the antithesis of what Congress sought in enacting a regulatory scheme valuing stability, predictability, and balanced carrier and ratepayer interests. Petitioners urge the Court to grant their Petition and protect the legislative intent, resolving the stark conflict in decisions that has been created and making it clear that retroactive rate regulation is prohibited under the Communications Act.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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